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No. 71-505

In the Supreme Court of the United States

OCTOBER TERM, 1971

SIDNEY TUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of six counts of forging endorsements on United States Treasury checks and six counts of uttering and publishing the checks, in violation of 18 U.S.C. 495. He was sentenced to one year in prison and a fine of $2,200. The court of appeals affirmed without opinion (Pet. App. A).

The evidence showed in essence that petitioner, as part of his business of bookkeeping and preparing income tax returns, prepared six federal tax returns during the years 1967 and 1968. In each instance petitioner received refund checks intended for the taxpayers. He then cashed the checks after signing the payee's name without authority (Tr. 38-39, 56-57,

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60, 66, 68, 95, 103–104, 122, 134–135, 145–150, 159, 195–196, 205–206, 220, 223, 230).[1]

Petitioner asserted as a defense that he was being blackmailed by a person who had threatened his parents' lives (Tr. 212–215), and that all but two of the checks had been cashed to obtain funds to pay the blackmailer (Tr. 215, 217–218, 223). He testified that the checks payable to the other two taxpayees (Marlene Tashima and Sally Hughes) were cashed as the result of mistaken identity caused by the fact that two clients with similar names had authorized petitioner to cash their checks (Tr. 216, 221–222).

1. Petitioner first contends that the jury was improperly instructed on the law of coercion as a defense to forgery. The court, without objection from petitioner's counsel, instructed the jury as follows (Tr. 306–307):

> Although coercion or compulsion will never excuse taking the life of an innocent person, it may provide a legal excuse for lesser crimes. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present, and immediate, and of such a nature as to induce a well-founded fear of impending death or serious bodily injury; and there must be no reasonable opportunity to escape the compulsion without committing the crime, or participating in the commission of the crime.
>
> If the evidence in the case should leave the jury with a reasonable doubt whether, at the

[1] "Tr." refers to the transcript of the trial testimony, contained in two volumes paginated consecutively.

> time and place of the alleged offense, the accused acted, or failed to act, willingly and voluntarily; that is to say, whether the accused was then and there forced, in effect, to commit or aid in the commission of the crime charged in the indictment by coercion or compulsion, as just explained, then the jury should acquit the accused.
>
> The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Although the court did not specifically instruct that legal coercion could result from fear of danger to a near relative as well as to petitioner himself, the instruction is not limited to the defendant and thus covers fear of injury to a relative. Accordingly, there is no basis for objection.

2. Petitioner also contends that the court erred in not defining the phrase "without authority" as it appears in the instructions on forgery (Tr. 310). The term "authority," however, is of common usage and would not likely be misunderstood by the jury. No request was made that the trial judge amplify his instruction in this regard.

3. During trial, one Connie Fierro testified as to information received from Ogden, Utah, concerning her check which petitioner had cashed. When defense counsel objected, the court, in sustaining the objection, said that the testimony "may go out as being hearsay" (Tr. 82). Petitioner asserts that this was reversible error since the court failed to admonish the jury to disregard the testimony. Since there was independent

proof that petitioner had cashed the check made payable to Mr. and Mrs. Fierro (Tr. 95, 220–221)—the crux of the charge under 18 U.S.C. 495—no reversible error occurred.

4. Petitioner asserts, for various reasons,[2] that he was denied effective assistance of counsel.

(a) Among other things, he contends that his representation was inadequate because defense counsel failed to request exclusion from the courtroom of government witnesses. This plainly does not show ineffective assistance of counsel. Moreover, not all witnesses were present during the testimony of others (*e.g.*, Tr. 78–79, 119).

(b) Petitioner contends that counsel was derelict in failing to request the prosecution to rest its case at the end of the first day of trial. The record, however, discloses only that the trial judge desired to recess for the afternoon. There is no indication that the prosecution did not have other evidence for the next day of trial (Tr. 165–166).

(c) Petitioner next contends that defense counsel should have moved for acquittal at the close of the case in order for the sufficiency of the evidence to be reviewable on appeal. There is no close question here as to sufficiency of the evidence. Moreover, the failure to move for acquittal does not preclude the review of the sufficiency of the evidence to prevent a "manifest

[2] Petitioner's first three grounds for his contention of inadequacy of counsel—failure of defense counsel to object to the coercion instruction, failure to object to the instruction on forgery, and failure to request an instruction that the jury disregard testimony to which objection was sustained—are adequately discussed by prior portions of this memorandum.

miscarriage of justice." *United States* v. *Ingman*, 426 F. 2d 973, 976 (C.A. 9); *Rodgers* v. *United States*, 402 F. 2d 830 (C.A. 9); *Maxfield* v. *United States*, 360 F. 2d 97 (C.A. 10); *Garrett* v. *United States*, 356 F. 2d 921 (C.A. 5).

(d) Petitioner argues that defense counsel should have refuted the closing argument of the prosecution (Pet. 14) regarding the defense of coercion. Defense counsel, however, gave his version of the testimony (Tr. 296–297); moreover, the court adequately instructed the jury on this subject (Tr. 306–307). See *Tenorio* v. *United States*, 390 F. 2d 96, 99 (C.A. 9), certiorari denied, 393 U.S. 874.[3]

(e) Petitioner asserts that counsel should have objected to the court's instruction on burden of proof as to the defense of coercion. The record makes clear that the court repeatedly instructed the jury that the burden of proof was on the prosecution (Tr. 302, 305, 314). Indeed, immediately following its instruction on coercion the court charged (Tr. 307);

> The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

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[3] Equally without merit is petitioner's contention that the United States Attorney was guilty of misconduct because of his argument to the jury on the elements of coercion as a defense (Tr. 291–292). Any misstatement by the prosecution was cured by defense counsel's own argument and the court's instruction, *supra*.

(f) Petitioner urges that counsel was ineffective in failing to object to the trial court's decision to let the jury deliberate into the evening of the last day of trial. There is no evidence that this prejudiced petitioner. In any event, the failure to object clearly did not constitute ineffective assistance of counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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